No. 22702

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SUN VALLEY DISPOSAL CO., INC., a corporation,
Appellant,

vs.

SILVER STATE DISPOSAL CO., *et al.*,
Appellees.

REPLY BRIEF OF APPELLANT.

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The Appellees have failed to meet the basic issues of the appeal. The Appellees' Brief directs its arguments to a theory of the case wholly inconsistent with the amended complaint and the evidence in support thereof.

I.

The Appellees Erroneously Attempt to Reconstruct the Amended Complaint as a Claim Merely That the Franchise Should Never Have Been Awarded (Reply to Appellees' Brief, Page 8, Lines 31-33).

The amended complaint contains material allegations that would have to be stripped away before the claim can be characterized as nothing more than an attack upon the franchise [R. 120-129]. Substantial evidence in support of these allegations is the subject not only of a factual statement, but an argument of inferences, viewed in the light of applicable decisions (Opening Brief of Appellant, pp. 13-18, 54-56).

Pertinent evidence demonstrates the following: That the Appellees did formulate a specific exclusionary intent prior to the commencement of business by Sun Valley; that from the outset the Appellees expressed hostility toward independents due to their depressive influence on a uniform rate structure in all phases of the garbage industry in Clark County, including not merely pick-up and disposal service, but also container merchandising as a line of interstate commerce; that immediately thereafter acquisitions accompanied by covenants against competition were used to remove independents from the market; that after the entry of Sun Valley as a competitor in the unincorporated area of Clark County the Appellees attempted to achieve their pre-existing goal through predatory trade practices, including among others the subsidization of a losing operation in the unincorporated area of Clark County out of profits derived by reason of doing business in non-competitive territories, such as the City of Las Vegas, and merchandising containers in a separate sub-market; that the Appellees' effort was aided by an agreement or understanding with a California equipment distributor, whereby the Appellees received terms and prices, in connection with the purchase of trucks and equipment, which that distributor would not make available to other garbage collection and disposal operators [R. 2523-2524, 2728, 6397-6400]; that inferential support is in the record that the relationship between the Appellees and the distributor afforded reciprocal advantages of such a nature that a number of separate legal persons, both individual and corporate, were at this point involved in an unreasonable restraint of trade, even if their effort had failed to succeed or success was impossible merely through predatory trade practices with-

out further efforts directed toward proceedings by the County Commissioners on the subject of the exclusive franchise for a garbage pick up and disposal service in the unincorporated area of Clark County, that the Appellant Sun Valley suffered injury and sustained damages from these trade practices, even if final destruction of its business required the award of the County franchise to the Appellees; that a civil action for damages based upon the anti-trust statute should be sustained where there is proof that a business has been injured by the existence and prosecution of an unlawful combination through private commercial behavior.

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777, 784 (1962), it is stated:

> "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '. . . (T)he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U.S. 525, 544 . . .; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' American Tobacco Co. v. United States, 147 F. 2d 93, 106 (CA 6th Cir.). See Montague & Co. v. Lowry, 193 U.S. 38, 45, 46, 48 L. Ed. 608, 611, 612."

II.

The Appellees Cannot as a Matter of Law Presuppose That Ordinance No. 214 Was Legislative Action by the County Commissioners Pursuant to the State Enabling Statute Where Circumstantial Evidence Shows That One or More County Commissioners, Motivated by Personal Selfish Reasons Unrelated to the Public Interest, Joined the Unlawful Combination and in Furtherance of Its Object Instigated Action Under the Guise of Legislation but in Reality for the Benefit of the Private Members of the Combination (Reply to Appellees' Brief, Page 10, Lines 11 to 14).

Additional overt acts were committed in furtherance of the objective of the unlawful combination. They involve action taken by the County Commissioners. They are not immune as a matter of law. Proof that a conspiracy has been joined by state officials and that in furtherance of the object of the conspiracy the state officials have imposed an injurious restraint opens the private members of the conspiracy to liability under the anti-trust statute. *Bankers Life and Casualty Co. v. Larson,* (5 Cir. 1958) 257 F. 2d 377, 379; *Harman v. Valley National Bank of Arizona,* (9 Cir. 1964) 339 F. 2d 564, 566; *Alabama Power Co. v. Alabama Electric Cooperative, Inc.,* (5 Cir. 1968) 394 F. 2d 672, 684-685.

A. The Circumstantial Evidence Supports a Finding That the Unlawful Conspiracy Was Joined by One or More County Commissioners and That Its Object Was Furthered by Action Under the Guise of Legislation, but in Reality for the Benefit of the Private Members of the Combination.

The following evidentiary facts preclude a presupposition as a matter of law that Ordinance No. 214

was passed in 1964 by the Board of County Commissioners pursuant to the enabling statute, NRS 244.183:

(1) That Ordinance No. 214 removed rates to be charged to the public as a bid variable in advance of the invitation for bids [R. 6195, 6197];

(2) That Appellees instigated the form of Ordinance No. 214 which not only fixed the rates in advance, but also reserved the right to rent containers at unregulated rates [R. 6026-6027, 6081, 1121-356 to 357 and 391];

(3) That Commissioner La Porta moved and Commissioner Baskin seconded that Ordinance No. 214 be considered at a meeting on April 20, 1964 [R. 848];

(4) That one week before, on April 13, 1964, La Porta, in the course of his private insurance agency business, was actively involved in negotiations between the Appellees and their bonding company, and in writing La Porta revealed his knowledge that the Appellees had integrated their bonding capacity by using the "deep pocket" financial power of Disposal Investments and Silver State Disposal to sustain losses in selected garbage pick-up territories in two states [R. 3152-3153];

(5) That La Porta wrote bonds and insurance for the Appellees during the period 1957 to 1966 [R. 6170];

(6) That Baskin, in the course of his private restaurant business in the City of Las Vegas, where Appellees' affiliate had an exclusive contract for garbage pick-up and disposal service, not only used the services of Silver State Disposal, but he admitted

that he wanted only one garbage operation in all the pick-up territories of the county and that the Appellees, as the exclusive operator in the City of Las Vegas, should be awarded exclusive rights elsewhere in the county [R. 1496-1501, 1508-1511, 1522-1523];

(7) That on August 7, 1961, about three years before, when the first void franchise was voted by the County Commissioners to Clark Sanitation, Inc., La Porta moved to grant the franchise and Baskin joined in the vote of approval [R. 1121-235 to 236];

(8) That at the meeting of August 7, 1961, the County Commissioners were informed that the Appellees were merchandising containers under a separate rate structure [R. 1121-223 to 225];

(9) That the County Commissioners knew that the first franchise had been annulled by court decree and that La Porta was instigating that a second franchise be awarded [R. 1121-361];

(10) That on June 5, 1964, when Ordinance No. 214 was adopted, Baskin made the motion and La Porta seconded it [R. 849];

(11) That on September 17, 1964, La Porta revealed his knowledge of steps being taken towards the invitation for bids [R. 851-852];

(12) That the invitation for bids was a sham, as discussed on pages 24 to 27 of the Appellant's Opening Brief;

(13) That competition in the bidding process was fettered under the arrangements whereby the County Commissioners reserved the right to consider the bids for the franchise and dumpsite use permit to-

gether, that 75% to 85% of the dumpsite business coming from the City of Las Vegas franchise holder would have to be accepted free of charge and Appellees' affiliate, Silver State Disposal, was the City of Las Vegas franchise holder, that Appellees' affiliate, Silver State Disposal had operated the dumpsite for 13 years, only it owned equipment usable in connection with the dumpsite, only it could insert such equipment in response to one of the bid variables and it enjoyed this advantageous position because of a prearranged deal with the County Commissioners *for private use* of federal land held by Clark County *purportedly for public use* as a dumpsite [R. 1121-369 to 379, 383, 385, 388, 399, 200 to 207, 297 to 300, 413 to 424];

(14) That County Administrator Cahill stated at the meeting of March 5, 1965, when the bids were considered: "(T)he figures indicate that the Sun Valley is the highest bidder—bidding the most—highest percentage of gross *and I don't believe there is any question, probably no question that they are the best bidder on the franchise collection,* but as to the operation of the dump, it was I think, my opinion that . . . others came in that they were not set up to operate the dump under the terms of the bid as it was proposed to properly operate it. Because, essentially the greatest portion—whatever you may want to say is 75, 80 or 85% of the load of the business of the dump comes from the city franchise." [R. 1121-385];

(15) That the County Commissioners who voted to award the franchise to Clark Sanitation, Inc. on March 5, 1965 had personal selfish reasons unrelat-

ed to the public interest, as discussed on pages 27 to 29 of Appellant's Opening Brief;

(16) That only after a majority vote was cast in favor of Clark Sanitation, Inc., did La Porta announce: "I would like the record to show that my vote is passed, the purpose being that my agency has represented the client as a broker in a neighboring municipality" [R. 1121-392].

Whether there was concerted action may be proven by circumstantial evidence; indeed, such is the only manner in which a case of this kind could ordinarily be established. *Esco Corp. v. United States,* (9 Cir.) 340 F. 2d 1000, 1007; *Girardi v. Gates Rubber Company Sales Division, Inc.,* (9 Cir.) 325 F. 2d 196, 200; *Standard Oil Company of California v. Moore,* (9 Cir.) 251 F. 2d 188, 210, cert. denied, 356 U.S. 975; *Flintkote Company v. Tysfjord,* (9 Cir.) 246 F. 2d 368, 374, cert. denied, 355 U.S. 835.

In *Esco Corp. v. United States, supra,* 340 F. 2d at 1007, the court pertinently observed: ". . . it is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged. * * * a knowing wink can mean more than words."

B. Appellees Have Misplaced Their Reliance Upon Decisions Whose Facts Did Not Disclose Joinder of the Conspiracy by State Officials.

The Appellees have ignored the holdings that proof of a conspiracy, in which the state officials are participants, is subject to the antitrust laws. *Bankers Life and Casualty Co. v. Larson,* (5 Cir. 1958) 257 F. 2d

377, 379; *Harman v. Valley National Bank of Arizona*, (9 Cir. 1964) 339 F. 2d 564, 566; *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, (5 Cir. 1968) 394 F. 2d 672, 684-685.

The following decisions cited in the Appellees' Brief are distinguishable:

(1) "In *Parker v. Brown*, 317 U.S. 341, 351, 63 S. Ct. 307, 314, 87 L. Ed. 315 (1943), the Court specifically reserved the question of the applicability of the Sherman Act to the case of 'a state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade,' and *Noerr* does not hold that the Act would be inapplicable in such a situation." *Harman v. Valley National Bank of Arizona, supra*, 339 F. 2d at 566. Thus, appellant distinguishes *Parker v. Brown, supra*, cited on Page 10 of Appellees' Brief, and *Eastern Railroad President's Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), cited on page 14 of Appellees' Brief.

(2) In *Woods Exploration & Prod. Co. v. Aluminum Co. of America*, (S.D. Tex. 1968) 284 F. Supp. 582, cited on Page 11 of Appellees' Brief, the following appears in Footnote 8, 284 F. Supp. at page 589:

"* * * Also, there appears to be a conflict on whether joinder of the state official, who uses his office to impose the restraint makes a difference on whether the private party can be held liable. *Compare* Harman v. Valley Nat'l Bank of Arizona, 339 F. 2d 564 (9th Cir. 1964), with Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass. 1957). * * *"

(3) In *Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light,* (5 Cir. 1954) 214 F. 2d 413, 417, cited on Page 13 of Appellees' Brief, there was no suggestion that members of the State Road Department had joined the conspiracy and had refused to grant Okefenokee a permit to run its power line down a state highway in furtherance of the conspiracy, and there was no suggestion that members of the Duval County Commissioners had joined the conspiracy and had acted under the guise of regulation, but in reality to further an anticompetitive conspiracy. Moreover, the *Okefenokee* case was followed four years later by the Fifth Circuit pronouncement in *Bankers Life and Casualty Co. v. Larson, supra,* 257 F. 2d at 379, which applied the Sherman Act to a conspiracy participated in by state officials.

Furthermore, in *Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co., supra,* 214 F. 2d at 418, it was stated: "It is not claimed that either the State Road Department or the Board of County Commissioners was acting beyond its respective jurisdiction, or that for any other reason its action was invalid."

(4) In *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, et al.,* (1 Cir. 1966) 362 F. 2d 53, cited on Page 15 of Appellees' Brief, there was no evidence of an anticompetitive conspiracy joined by state officials other than the exclusive contract *per se,* which was valid under state law. Therefore, the Court held that the mere conclusionary allegation of conspiracy absent any specification of circumstances other than the exclusive contract was insufficient to state a claim under the antitrust laws.

(5) In *United Mine Workers of America v. Pennington*, 381 U.S. 657, 671, 85 S. Ct. 1585, 1594, 14 L. Ed. 2d 626 (1965), cited on Page 18 of Appellees' Brief, it was stated that the act which injured the plaintiff was:

"(T)he act of a public official who is *not* claimed to be a co-conspirator." (Emphasis added.)

(6) In *S. & S. Logging Co. v. Barker*, (9 Cir. 1966) 366 F. 2d 617, it was merely held that the federal officials of the United States Forest Service, as distinguished from the private outsiders, were immune from suit under the antitrust laws, because their action did not exceed their unqualified discretionary power under federal regulation to reject all bids with or without reason. The limits of this decision are discussed in Tustin, "*Immunity of Federal Officials From Civil Liability in Antitrust Suits*," 19 Stanford L. Rev. 1101 (1967). The concurring opinion implies that the joinder of the official makes a difference on whether the private party who is a member of the unlawful conspiracy is liable under the antitrust statute.

In sum, Appellant's Opening Brief, Page 70, Lines 11 to 14, correctly stated:

"In the authorities cited in the memorandum opinion of the court below, the governmental action which furnished immunity from the antitrust law was clearly valid governmental action in compliance with state law."

It is unjustified for the Appellees' Brief, Page 20, Lines 8 to 12, to argue that the holdings adopted in the

memorandum opinion of the court below were not mentioned by Appellant Sun Valley for consideration by this Court. They are distinguishable cases.

III.

The Appellees Have Erroneously Assumed That Summary Judgment Was Granted on the Same Issues as Are Here Involved in Woods Exploration & Prod. Co. v. Aluminum Co. of America, (S.D. Tex. 1968) 284 F. Supp. 582 (Reply to Appellees' Brief, Page 11, Lines 27 to 32).

The Appellees have failed to perceive the factual situation revealed by the decision, which distinguishes it from the case at bar.

Firstly, the decision did not depart from two basic principles, namely: (1) That it is an open question whether joinder of a conspiracy by a state official, who uses his office to impose the restraint, makes a difference on whether the private party can be held liable (248 F. Supp. at Page 589, Footnote 8); (2) That where a state statute vests the power in a private party to commit the injurious act, the act, even if it is performed in the course of dealing with the state agency, may be deemed private commercial behavior within the purview of *Continental Ore Co. v. Union Carbide & Carbon Corp., supra,* 370 U.S. 690, since the injury is not deemed to have flowed solely from official action (284 F. Supp. at 593).

The earlier decision in the same case expressly recognized the second principle. The subsequent decision did not modify the principle. It was rendered only after the completion of pretrial discovery disclosed the factual basis for the claims and defenses. That disclosure

included the following evaluation of the relationship between the private party and the state agency (284 F. Supp. at 593):

> "The Texas Supreme Court made clear in Railroad Comm'n v. Woods Exploration & Producing Co., 405 S.W. 2d 313 (Tex. 1966), that the Commission alone has the power and the duty to set allowables. The procedure followed by the Commission of requiring the producers to submit forecasts before the allowables are set is no more than a mere 'administrative device.' Id. at 319. The figure submitted by the individual producers are not binding on the Commission, and it does not have to set allowables based on their mathematical total. Thus any injury which any producer claims to have suffered because of the allowable assigned to him is an injury directly inflicted by the Railroad Commission and not an injury inflicted by his fellow producers directly or through the exercise of any discretionary power conferred upon them by the State."

By contrast, in the case at bar, the County Commissioners by the publication of bid variables in the invitation for bids delegated to the competing bidders the discretionary power to make the material representations which the County Commissioners were required to fully consider, since the state statute, N.R.S. 244.183(3), stated in its pertinent part:

> "* * * The Board of County Commissioners *shall* give full consideration to any application or bid to supply such services * * * and *shall* grant the franchise on terms most advantageous to the County and the persons to be served." (Emphasis added.)

Thus, under the statutory scheme for competitive bidding formulated herein, the bidders were possessed of the power to insert amounts in their applications or bids which the County Commissioners, if they complied with the statutory mandate, were required to consider. Therefore, the trade practice of fraudulent misstatement in a bid, as charged herein, was truly private commercial activity, as distinguished from lobbying, within the purview of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 86 S. Ct. 1404, 8 L. Ed. 2d 777 (1962).

In *Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co., supra,* 214 F. 2d at 416, the alleged fraud consisted of a false argument before the State Road Department which led that agency to deny a permit to the plaintiff to build a power line along a selected highway; but the action which injured the plaintiff was the denial of the permit, which the state agency alone had the power to do regardless of the arguments presented to it.

IV.

The Appellees Have Disregarded the Business Realities of Container Merchandising to Characterize the Industry as Solely a Local Service (Reply to Appellees' Brief, Page 24, Lines 29 to 30).

There is a genuine issue of fact whether Sun Valley's business was destroyed so that it would be eliminated as an independent distributor in the container sub-market pursuant to efforts designed to achieve the goal of keeping independents from having a depressive influence on county-wide container rental rates in the flow of that line of interstate commerce. This jurisdictional-fact issue is intertwined with the merits of

the case. Appellees' Brief, Page 26, Lines 9 to 10, is in error when it cites the absence of facts as to the ability of the Appellees to affect the prices charged for these containers.

The Appellees have evaded answering the evidence as to the merchandising of containers in substantial volume at high profit in the flow of interstate commerce by the use of a phrase, "sophistry of words and legal conceptualizations." (Appellees' Brief P. 22, Lines 3-6). However, the inferential proof supports the finding that the Appellees engaged in a scheme to remove independents so as to keep them from having a depressive influence on the container rental rate structure, that the container rental activity was a separate sub-market, that the flow of interstate commerce continued until the containers reached the customers of the garbage pick-up and disposal service and that the business of Sun Valley was destroyed by the existence and prosecution of the anticompetitive scheme (Opening Brief of Appellant, pp. 6-18, 37-45).

The Appellees have disregarded the business realities of container merchandising in order to characterize the industry as a purely local service, "to wit, the service of garbage collection and disposal" and have thus misplaced their reliance on *Page v. Work*, (9 Cir. 1961) 290 F. 2d 323, cert. denied, 368 U.S. 875 (1962).

V.

The Appellees Have Failed to Perceive the Significance of the Purchase of Equipment Manufactured Outside of Nevada, Viewed Against the Reciprocal Relationship Between Appellees as an Outlet and a California Distributor of Equipment in Interstate Commerce in Competition With Comparable Equipment Sold by Other Distributors (Reply to Appellees' Brief, Page 25, Lines 18 to 21).

Pages 20 to 21 of the Opening Brief for Appellant spells out in detail the interrelationship between the Appellees and Arata Pontiac. Pages 52 to 54 of the Opening Brief for Appellant argues the impact of the reciprocity upon interstate commerce. It is illogical to assume as a matter of law that the capture of all available outlets in a territory for equipment by a single interstate supplier does not provide a jurisdictional basis for an anti-trust claim.

The Court cannot assume as a matter of law that the freedom of the surviving garbage pick-up and disposal companies to buy equipment from other manufacturers has not been hobbled by the Appellees' business arrangements with Arata Pontiac.

The Court cannot assume as a matter of law that the affiliated ownership, management and control of the Appellees by Arata Pontiac through interlocking directorates was not part and parcel of a deliberate and calculated purpose of Arata Pontiac to control the operating companies' purchase of equipment, and that no compulsion or reciprocal control had been exercised to control such purposes. The record contains evidence of the advice given by Arata Pontiac to Appellees as

to the maximum number of front-end loaders to purchase for large-volume commercial pick-ups, since Arata's manufacturer, Leach, did not at the time manufacture front-end loaders and Arata Pontiac wanted to maximize the Leach sales under its franchise with Leach and in turn minimize Appellees' purchase of competitive equipment [R. 2827-2830].

The Court cannot assume as a matter of law that the Appellant Sun Valley was not hobbled in its ability to purchase equipment in interstate commerce. The record contains evidence that Arata sold equipment at cost to Appellees, contrary to a long-established policy [R. 2523, 6397-6400]. It may reasonably be inferred that the Appellant Sun Valley had no supplier available to forego a profit on the sale of equipment. Furthermore, the Appellant Sun Valley should have been able to purchase Leach equipment on the same terms and conditions as the Appellees; and since Arata Pontiac had the Leach franchise for Southern Nevada, it is obvious that the Appellant Sun Valley was at a disadvantage.

These principles are clearly cognizable under the antitrust law. In *United States v. Yellow Cab Co.*, 332 U.S. 218, 224, 67 S. Ct. 1560, 1563, 91 L. Ed. 2010, it was held that a cause of action under the anti-trust law was alleged in the third charge, namely, a conspiracy to restrain and monopolize the sale of taxicabs by control of the principal companies operating them in Chicago, New York, Pittsburgh and Minneapolis. For a subsequent appeal, see 338 U.S. 338.

VI.

The Appellees Have Erroneously Isolated the Page, Arizona, Operation Prior to 1964 From Substantial Evidence of a Continuing Interstate Enterprise (Reply to Appellees' Brief, Page 31, Lines 12 to 18).

Appellees have completely ignored the detailed pertinent facts discussed on Pages 18 to 19 of the Opening Brief for Appellant. They ignore the integrated enterprise, in which the Appellees combined their corporate and individual bonding capacities to maintain in two states a group of saleable franchises. [R. 2964, 3018-3019, 3031, 3152-3155, 3370, 3373, 3380-3391]. They ignore the fact that after 1964 the tradename of Henderson Disposal Service, which was used in Nevada, was licensed for use in Arizona, and the bonding capacity of the Arizona licensee was sustained by that of the Appellees so that the functioning of the integrated enterprise on a two-state basis through the affiliated license has continued at all times material thereafter until the filing of the complaint [R. 2371-2373, 3747-3750, 3752-3753, 3759-3762].

VII.

The Appellees Have Erroneously Presupposed That the Federal Jury Must Award a Verdict Nullifying a Franchise Under State Law (Reply to Appellees' Brief, Pages 33 to 37).

The federal jury awards damages. No decree is entered by the jury annulling a franchise under state law. The power of a jury to award damages is well recognized.

A jury is fully equipped to resolve one or more of the following issues: (1) Whether the action of the

County Commissioners was under the guise of legislation, but in reality in furtherance of an anticompetitive conspiracy joined by those commissioners; (2) whether the invitation for bids was a sham that evaded free competition on a common basis.

In making its determinations, the jury does not interpret Nevada state law. To the extent such an interpretation is essential, that is the function of the court. Indeed, the federal court will probably look to the lower state court decision, as fully discussed on Page 73 of the Appellant's Opening Brief. There need be no decree annulling the franchise.

The effect of the state law on the validity of the franchise is not dispositive of the federal antitrust claim. See *Knuth v. Erie-Crawford Dairy Coop. Association*, (3 Cir. 1968) 395 F. 2d 420, which reversed the trial court not only for failure to recognize the antitrust claim, but also for failure to adjudicate the State claim under pendent jurisdiction. The amended complaint herein alleges pendent jurisdiction over the State claim [R. 108, lines 8-10].

It is immaterial that the Appellant has instituted a damage action in state court, based on fraud and the invalidity of the franchise; and it is immaterial that, in the state court damage action, there has been joined a claim against the County Commissioner for invalidation of the franchise. Appendix B, annexed to Appellees' Brief, sets out the state court complaint. It does reveal that Appellant has invoked every available remedy in its behalf. It does not deprive the federal court of jurisdiction.

Contrary to Appellees' Brief, Page 33, Line 17, Appellant Sun Valley is not pursuing the "Golden Fleece" of treble damages.

In *Bruice's Juices v. American Can Company,* 330 U.S. 743, 571-572, 67 S. Ct. 1015, 1019, 91 L. Ed. 1219 (1947), Mr. Justice Jackson stated:

> "Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute enforced, it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. * * * *It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and a reasonable attorney's fee."* (Emphasis added).

Conclusion.

For the reasons heretofore given in their Opening Brief, fortified by this reply, Appellant respectfully urges that the Court reverse the summary judgment entered herein.

Respectfully submitted,

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